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In the Supreme Court
of the United States

OCTOBER TERM, 1970

No. 1143

JAMES D. McMAHAN,

Petitioner,

v.

STATES STEAMSHIP COMPANY,
a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, JAMES D. McMAHAN, plaintiff-appellant below, respectfully prays a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Oregon in the above entitled case entered September 23, 1970 affirming the trial court's order that a new trial be granted unless petitioner file a remittitur of one-half of the jury verdict in an action brought by petitioner, a merchant seaman, for dam-

ages for personal injuries sustained while serving aboard defendant's vessel.

OPINION BELOW

The opinion of the Supreme Court of the State of Oregon is reported at 91 Adv. Sh. 371, — Or. —, 474 P.2d 515 (1970) and is appended at pages 7 to 9 (Appendix A).

JURISDICTION

The judgment of the Supreme Court of the State of Oregon was entered September 23, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

QUESTION PRESENTED

Whether this Court will permit the Supreme Court of the State of Oregon to freely detract from an injured seaman's federally-created substantive right by permitting the Oregon Supreme Court to interfere with the jury's determination of what constitutes reasonable compensation for the seaman's injuries.

STATUTE INVOLVED

46 U.S.C. 688:

"*Recovery for injury to or death of seaman.* Any seaman who shall suffer personal injury in the course of his employment may, at his election maintain an action for damages at law, with the right of trial by jury, and in such action all

statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. Mar. 4, 1915, c. 153 § 20, 38 Stat. 1185; June 5, 1920, c. 250, § 33, 41 Stat. 1007."

STATEMENT OF THE CASE

Petitioner, while employed on defendant's ship as a deck maintenance man (Tr. 5), was injured when he caught a shipmate who fell into petitioner's arms when a wooden ladder the shipmate was climbing shattered, split along the rail and collapsed (Tr. 10-12).

Petitioner's injuries included a lump on his left arm, stiffness and soreness on his right side, lower part of his back, his right shoulder, and in his muscles and in his right elbow (Tr. 15, 16); and a quarter-inch multiple nodule (hemorrhoid) inside petitioner's anus (Tr. 56).

Without objection by defendant, the court allowed

petitioner's motion for directed verdict on liability, leaving only the question of damages to be determined by the Jury (Tr. 89). The jury returned a verdict in favor of petitioner in the sum of $7,000.00. The trial court, on defendant's motion to set aside verdict and for a remittitur, entered an order granting defendant a new trial unless plaintiff file a remittitur of $3,500.00 of the verdict and judgment within seven days.

Petitioner did not file a remittitur and filed a timely notice of appeal to the Oregon Supreme Court from the order granting a new trial unless petitioner file a remittitur. The ruling of the trial court was affirmed by the Oregon Supreme Court on September 23, 1970 (Appendix A).

REASONS FOR GRANTING WRIT

The Supreme Court of the State of Oregon has:

1. Consistently failed to correctly apply the clear rulings of this Court in *Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 U.S. 107, 80 S. Ct. 173, 4 L. Ed. 2d 142 (1959) and *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957) and Mr. Justice Black and Mr. Justice Brennan's Dissent in this Court's ruling on denial of the petition of Rollo Reeves for writ of certiorari to the Supreme Court of Oregon, *Reeves* v. *Pacific Far East Lines, Inc.*, 396 U.S. 908, 90 S. Ct. 412, 24 L. Ed. 2d 184 (1969), that courts are not free to re-weigh the evidence and reduce a jury verdict because the judge

might evaluate facts differently or the judge might feel that a lesser jury damages award would be more reasonable; and

2. Failed to apply a correct interpretation of the injured seaman's federally-created right to an unbiased jury award of damages as succinctly set forth in *Taylor* v. *Washington Terminal Co.*, 409 F.2d 145 (C.A. D.C. 1969), wherein it is clearly established that a jury award of damages in a Jones Act case cannot be tampered with by an appellate court where the amount of damages found by the jury are within the maximum limit of a reasonable range; and

3. Permitted reduction of a jury verdict in a Jones Act case without requiring the trial court to justify the reduction on any ground whatsoever.

CONCLUSION

A federally-created right cannot be permitted to be defeated by a state court's erroneous interpretation of federal law. The Supreme Court of the State of Oregon having usurped the fact-finding function of the jury in this Jones Act case, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

No. 9474—September 23, 1970

IN THE SUPREME COURT OF THE STATE OF OREGON

McMAHAN, *Appellant*, *v.* STATES STEAMSHIP COMPANY, *Respondent*.

Appeal from Circuit Court, Multnomah County.

VIRGIL LANGTRY, Judge.

Argued and submitted September 11, 1970.

Marvin S. Nepom, Portland, argued the cause for appellant. With him on the brief was Ben T. Gray, Portland.

Erskine Wood, Portland, argued the cause for respondent. With him on the brief were Wood, Wood, Tatum, Mosser & Brooke, Portland.

Before O'CONNELL, Chief Justice, and McALLISTER, DENECKE, HOLMAN,* TONGUE, HOWELL and MENGLER, Justices.

AFFIRMED.

TONGUE, J.

This is an action under the Jones Act by a merchant seaman for personal injuries sustained when he "caught" a shipmate who fell into his arms upon the collapse of a wooden ladder.

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* Holman, J., did not participate in this decision.

The principal injury complained of by plaintiff (aside from some temporary soreness in plaintiff's back, side, shoulder, and elbow and small lumps on his left forearm and side), consisted of a small hemorrhoid, which at the time of trial continued to be uncomfortable and to occasionally bleed. Plaintiff's doctor testified that this could be repaired by minor surgery, but that he (the doctor) had a hemorrhoid himself and preferred to "live with it."

Defendant admitted liability and also did not deny plaintiff's medical testimony that these injuries were caused by the accident—the sole issue being one of damages. The jury returned a verdict for $7,000. The trial judge ordered a remittitur of $3,500. Plaintiff appeals from a judgment for the remainder in the sum of $3,500.

Plaintiff concedes on appeal that Article VII, § 3, of the Oregon Constitution has no direct application in determining whether or not verdicts should be set aside as "excessive" in actions under the Jones Act in the courts of this state. *Hust v. Moore-McCormack Lines, Inc.*, 180 Or 409, 415-436, 177 P2d 429 (1947).

Plaintiff contends, however, that in such cases this court must still apply the same standard as applied in such cases by the federal courts and as stated in *Taylor v. Washington Terminal Co.*, 409 F2d 145 (DC Cir 1969). In that case the Court of Appeals reinstated a jury verdict, despite the ordering of a remittitur by the district court, and (at p 149) stated that the trial judge must give "great weight" to the

verdicts of juries, as the "primary fact finders" under provisions of the Constitution of the United States, and should not grant an application for a remittitur "* * * unless the verdict is so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate." We agree that this is a proper test to be applied in such cases.

Plaintiff does not deny, however, that the application of this test to the facts of a particular case is a matter within the discretion of the trial judge, for which he will not be reversed by this court unless it can be demonstrated that there was a clear abuse of discretion, as held by this court in *Sandow v. Weyerhaeuser Co.*, 252 Or 377, 379, 449 P2d 426 (1969).

We have examined the testimony in this case, including that of plaintiff and the medical testimony offered by him. Despite the discomfort which is well known to accompany the continued existence of such a small hemorrhoid (unless and until corrected by minor surgery), and despite the limitations imposed by the test as stated in the *Taylor* case, we cannot say that there was a clear abuse of discretion by the trial judge in requiring a remittitur under the facts in this case.

Affirmed.